

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Appellant

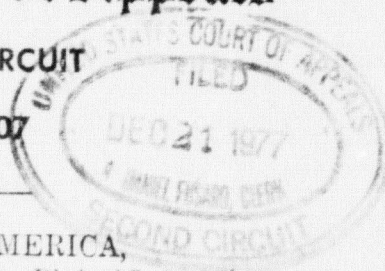
77-6107

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6107



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BERTRAM L. PODELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6107

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—against—

BERTRAM L. PODELL,
Defendant-Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Defendant-appellant Bertram L. Podell ("Podell") appeals from a judgment on behalf of the plaintiff-appellee United States of America ("United States") in the amount of Forty Thousand Dollars (\$40,000.00) entered on August 16, 1977, by the Honorable Kevin T. Duffy, United States District Judge for the Southern District of New York. Judgment was entered after the District Court granted the United States' motion for summary judgment to the extent of \$40,000.00; at the time of entry of judgment, the United States waived any further rights it may have against Podell for an accounting in excess of the \$40,000.00 awarded under the judgment.

In its Opinion and Order granting summary judgment ("opinion"), the District Court imposed a constructive trust on behalf of the United States upon certain monies

Podell had received in breach of his fiduciary duties to the United States which arose out of his position as a United States Congressman. The opinion is reprinted in the Joint Appendix, 276A-90A and is reported at 436 F. Supp. 1039; the final judgment is found at 305A-07A.

Issues Presented

1. Does the estoppel and admissions effect of Podell's guilty plea establish the facts for the grant of summary judgment here?
2. Does a United States Congressman's violation of the criminal conflict of interest statute (18 U.S.C. § 203) constitute a breach of his fiduciary duty to the United States for which he may be required to account to the United States?
3. Does a New York State statute of limitations governing claims based on fraud apply to this common law equitable action to impose a constructive trust brought by the United States?

Statement of the Case

The United States commenced this action for a constructive trust and an accounting by the filing of a complaint on January 30, 1976 (3A). The complaint alleged two separate claims both arising out of the basic allegation that Podell, while a member of Congress, received a total of \$41,350 as compensation for conflict of interest activities involving appearances before the Civil Aeronautics Board ("CAB") and the Federal Aviation Administration ("FAA") in connection with matters pending before those agencies involving Florida Atlantic Airlines, Inc., ("FAAL"), owned by Leasing Consultants, Inc. ("LCI"). The United States specifically alleged that Podell used his public office on behalf of LCI in its efforts

to obtain a designation for FAAL as a regularly scheduled air service between Florida and Freeport, Grand Bahama Islands, and to avoid possible FAA revocation of FAAL's operating certificate (4A-8A).

The complaint's first claim charged that Podell's conflict of interest activities on behalf of LCI violated his fiduciary duty as a United States Congressman, and asked that he be made to account to the United States for all money received for this conduct. The second claim asserted that Podell's conduct in breach of his agency relationship and implied contract of employment unjustly enriched him through monies which rightfully belong to the United States (*Id*). The amended answer denied all the material allegations in the complaint (other than Podell's former status as a United States Congressman), and asserted an unspecified statute of limitations as an affirmative defense (9A-11A).

The Government moved for summary judgment in the amount of \$41,350.00, relying upon Podell's guilty plea in *United States v. Podell*, 73 Cr. 675, certain documents and transcripts from the court records therein, and two affidavits from persons in the Department of Justice Criminal Division and the Office of the United States Attorney for the Southern District of New York (12A-214A; 224A-75A). Podell opposed this motion with his own affidavit (218A-23A).

On May 31, 1977 the District Court filed its opinion granting the United States summary judgment to the extent of \$40,000.00 (276A-90A; 436 F. Supp. 1039). The District Court concluded that Podell's plea of guilty to a violation of 18 U.S.C. § 203 conclusively established a breach of his fiduciary duty to the United States by receiving compensation from private clients for appearances on their behalf before the CAB and FAA. The Court further reasoned that admissions contained in Podell's carefully delineated guilty plea established the

source and means of his compensation, and that, as a matter of law, the three checks introduced into evidence by the Government at the criminal trial and in this case reflected the amount of the improper payments since Podell failed to introduce any evidence here indicating that this money had not been received by him (280A-86A; 436 F. Supp. at 1042-44). The Podell affidavit submitted in opposition to the United States' motion (a) admitted that the firm of Podell & Podell had received a total of \$11,000.00 from LCI for services rendered by Podell, (b) claimed that an additional \$1,350.00 was paid Podell & Podell for services rendered by his father Hyman Podell, and (c) was completely silent with respect to the \$29,000.00 campaign contribution check (218A-23A). Because the Podell affidavit appeared to create an issue of fact as to whether the services of Podell, or of his father Hyman Podell, caused the payment of \$1,350.00 to Podell & Podell by LCI, the District Court denied the United States' claim on that amount and limited its summary judgment award to \$40,000.00 (209A).

On June 30, 1977, Podell filed a Notice of Appeal from the May 31, 1977 opinion (3A, 291A). The following day, Podell filed an untimely motion for reargument before the District Court. On that motion Podell submitted two affidavits. The first affidavit was that of James L. LaRossa, counsel in his criminal trial, which set forth LaRossa's understanding of the scope of a guilty plea and of the Podell guilty-plea negotiations. The second affidavit was that of counsel for Podell in this action. By this affidavit Podell, for the first time, brought to the District Court's attention a bankruptcy proceeding in the Eastern District of New York (70-B-656) in which the Bankruptcy Judge had entered an award against the firm of Podell & Podell in the sum of \$12,350 for illegal payments Podell received from LCI; Podell argued that given that award it was unfair and inequitable for the District Court here to award judg-

ment in favor of the United States on those payments, thereby requiring Podell to account twice for that amount (292-02A).

The District Court granted reargument but adhered to its original decision, noting in particular that Podell had deliberately neglected to notify the Court earlier of the existence of the bankruptcy court proceeding, or of the \$11,000 award therein (303A).

Podell's Notice of Appeal was withdrawn by stipulation and order (34A). Subsequently, on August 16, 1977, final judgment in the amount \$40,000.00 was entered in the District Court, and an Amended Notice of Appeal from that judgment was filed (3A, 304A-07A).

STATEMENT OF FACTS

a) Podell's Conflict of Interest Guilty Plea

On July 12, 1973, Podell was indicted in a ten count indictment charging him and others with violations of Title 18, United States Code, Section 203 (conflict of interest), Title 18, United States Code, Section 201 (bribery), Title 18, United States Code, Section 1001 (false statements), and Title 18, United States Code, Section 371 (conspiracy). The basic charge in the indictment was that Podell, while a member of Congress, received \$41,350 in connection with his appearances before the CAB and the FAA on behalf of FAAL, which was seeking permission from the CAB to operate a route between Florida and the Bahamas and which was opposing a proposed revocation by the FAA of its operating certificate (37A-56A).

On October 1, 1974, after nine days of trial, Podell entered a guilty plea to Counts One and Five of the indictment, admitting that he had violated, and had

conspired to violate, the federal conflict of interest statute, Title 18, United States Code, Section 203 (31A, 58A-67A). These two counts of the indictment, however, were carefully revised and reworded before Podell entered his guilty plea.* The specific portions of the indictment to which Podell pleaded guilty, as thus specifically delineated, read as follows:

COUNT ONE

"1. From in or about March 1968, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, BERTRAM L. PODELL . . . and MARTIN MILLER, the defendants, and Kenneth G. Burnstine, and Michael Zorovich, named as co-conspirators but not as defendants, did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown, to violate Section . . . 203 of Title 18, United States Code and to defraud the United States and its departments, agencies and branches by obstructing, hindering and impairing said departments, agencies and branches in connection with the performance of their lawful governmental functions, including; the lawful governmental functions of the United States Congress and the legitimate representation by its members of the interests of the United States and their constituents; the lawful governmental functions of the Civil Aeronautics Board (CAB), the Federal Aviation Administration (FAA) . . . in

* These changes included, *inter alia*, removing references to an alleged co-conspirator and to the Department of State and deleting certain alleged overt acts and means from the conspiracy count, in addition to eliminating all charges other than conflict of interest and the related conspiracy charge (59A, 62A).

considering and approving routes for international air travel; the lawful governmental functions of the FAA in its determinations as to revocations of operating certificates . . .

* * *

5. Among the means by which the defendants and their co-conspirators would and did carry out the unlawful purposes set forth above, were the following:

* * *

(b) The defendant BERTRAM L. PODELL would and did, travel to the Bahama Islands to speak to United States and Bahamian officials, and send letters and make telephone calls to, and attend with, officers and employees of the U.S. and of agencies and departments thereof including the CAB, the FAA . . . for the purpose of selecting, inducing and pressuring said officials, officers and employees on behalf of FAAL.

(c) The defendant MARTIN MILLER and co-conspirators Kenneth G. Burnstine and Michael Zorovich would and did offer, and would and did . . . indirectly pay and caused to be paid, money and other things of value to the defendant . . . BERTRAM L. PODELL . . . and others, in the form of payments to the Citizen's Committee for the Reelection of Bertram L. Podell and in the form of fees to the law firm of Podell & Podell, and the defendant . . . BERTRAM L. PODELL . . . would and did agree to receive and did receive money and other things of value in return for the services described in paragraph . . . 5(b) of this count.

COUNT FIVE

The Grand Jury further charges:

From in or about December, 1968 up to and including September 24, 1970, in the Southern District of New York, BERTRAM L. PODELL a Member of Congress . . . the defendant . . . unlawfully, wilfully and knowingly otherwise than as provided by law for the proper discharge of official duties, directly and indirectly did receive and agree to receive, ask, demand, solicit, and seek compensation for services rendered and to be rendered by the defendant BERTRAM L. PODELL and others in relation to proceedings, applications, requests for rulings and other determinations, controversies and other particular matters in which the United States was a party and had a direct and substantial interest, before departments, agencies and officers of the United States, namely, an application by FAAL for a route designation then pending before the CAB . . . and a proceeding for suspension and revocation of FAAL's operating certificate then pending before the FAA and the National Air Transportation Safety Board."

At the guilty plea allocution the Court ascertained that there was a factual basis for the plea, and Podell and his attorney clearly admitted that Podell's guilty plea was defined by the revised language of Counts One and Five:

Mr. LaRossa: May it please the Court, on behalf of the defendant Bertram Podell, he hereby offers to plead guilty to certain portions of the first count of the indictment, namely the first full paragraph on page 2, eliminating the Herbert Podell, eliminating Section 201 of Title 18, and eliminating the Department of State.

In addition to that paragraph I am referring now to the means paragraph on page 4 of the

indictment, the defendant's plea will cover 5B, again eliminating the Department of State; 5C, eliminating the words "directly and" on the third line of that paragraph; eliminating the name of Herbert Podell throughout the paragraph—it appears in two instances—and the last full line of that section; paragraph 5A is to be eliminated as well.

In addition to that, the defendant offers to plead guilty to count 5 of the indictment, again eliminating the Department of State and Herbert Podell.

* * *

The Court: Mr. Podell, you have heard what Mr. LaRossa said, and what I have to ascertain is what he has indicated you are pleading guilty to; are you, in fact, doing that?

Defendant Podell: Sir, I'm sorry?

The Court: I'm sorry too.

Mr. LaRossa, your counsel, has indicated that you are pleading guilty to certain counts of the indictment with certain deletions. I want to know whether that is, in fact, true, whether you are in fact doing that.

Defendant Podell: *Yes, I am.*

* * *

What I would like to hear from you, tell me in your own words what it is you did in respect to the counts you are pleading guilty to so I can be satisfied that you are, in fact, guilty.

Defendant Podell: If the Court pleases, while a member of Congress and acting as a lawyer for Florida Atlantic Airlines and paid by Leasing Consultants, Inc., I appeared before various federal agencies, including the CAB, the FAA, and advocated the interests of the said Florida Atlantic Airlines.

I was indirectly compensated through my law firm for these appearances before the CAB and the FAA while a member of Congress.

I did not at the time know that I was violating any law, but I intended to do what I did.

The Court: I will accept the plea.

Mr. LaRossa: *I think Mr. Giuliani's statement should be read in conjunction with your acceptance of the plea, your Honor. It defines the limits.*

Mr. Giuliani: Your Honor, the government is agreeable to taking the plea to count 1, the conspiracy count, and count 5, the conflict of interest count.

It is the government's view that a plea to count 1 encompassing paragraphs 1 and 5B and C, and to count 5 satisfies the interests of justice in this case.

It is the government's position that the plea to the conspiracy count admits that the object of this conspiracy was to violate the conflict of interest law and thereby to defraud the United States.

The government also understands that the defendant is not in any way admitting the bribery objects of the conspiracy. He is admitting the conflict of interest and the defrauding to the extent that it is meant by "conflict of interest."

The two statutes carry maximum penalties of five years and \$10,000 on the conspiracy count, and two years and \$10,000 under the conflict of interest statute, for a total of seven years and \$20,000 maximum.

The government feels that the interest of justice is satisfied by taking the plea. (Emphasis added) (59A-63A).

The language of the indictment to which Podell pleaded guilty included the admissions that he received compensation in violation of the conflict of interest statute for services rendered on behalf of FAAL, and that the compensation came "in the form of payments to the Citizen's Committee for the Reelection of Bertram L. Podell and in the form of fees to the law firm of Podell & Podell." (App. 41A). At the criminal trial, the Government introduced into evidence three checks to establish the amount of the illegal payments to Podell: two checks from LCI totaling \$12,350.00 were drawn and paid to the law firm of Podell & Podell, and a check in the amount of \$29,000 from Martin Miller, President of LCI, was drawn and paid to Citizen's Committee for B.L. Podell (71A-76A).

Podell's plea and the above-described checks formed the basis of the United States' motion for summary judgment in this case (12A-76A). As noted above, the only opposition to the Government's motion was Podell's own affidavit. That affidavit was completely silent on the \$29,000 check (218A). Podell admitted that all but \$1,350.00 of the \$12,350.00 in fees received by the firm of Podell & Podell were for his services, but claimed that those fees were for trips he made to the Bahamas. *Id.**

b) Statute of Limitations

The evidence here established that the United States did not become aware of any portion of Podell's illegal conduct until August 23, 1971. (Jaffee Affidavit 20A-

* A second affidavit—that of James M. LaRossa—was submitted by Podell on his motion for reargument after summary judgment had been granted. That affidavit discusses the evolution of plea negotiations from the defendant's perspective, and outlines defense counsel's understanding of the law and his resulting advice; it neither adds to nor subtracts from the record of Podell's formal guilty plea (300A-02A).

24A; Weglian Affidavit, 16A-19A). Specifically, in response to a general statute of limitation defense pleaded in Podell's answer to the complaint herein (10A), the United States established on its motion for summary judgment that:

1. No official of the United States charged with responsibility to act in the circumstances was aware until August 23, 1971, that Bertram L. Podell had received compensation through fees paid to the law firm of Podell & Podell for services rendered before the CAB and FAA in connection with matters pending before those agencies involving FAAL.

2. No official of the United States charged with responsibility to act in the circumstances was aware until June 27, 1973, that Bertram L. Podell had received compensation through money paid the Citizens Committee for B.L. Podell for services rendered before the CAB and FAA in connection with matters pending before those agencies involving FAAL (16A-24A; 78A-214A; 224A-275A).

Podell did not offer any evidence to contradict these facts in any way.

As the evidence demonstrates, the Department of Justice first learned of the allegation that Podell had received compensation through his law firm for his services on behalf of FAAL before various federal agencies from an article which appeared in the Wall Street Journal on August 23, 1971 (16A-19A). The Office of the United States Attorney for the Southern District of New York did not have any knowledge of these facts until the investigation was forwarded to it by the Department of Justice in November, 1972 (20A-24A). Likewise, the United States did not know of the existence of the third check, payable to the Committee for the Reelection of B.L. Podell, until June 27,

1973 when Martin Miller came forward with this information (81A-214A; 106A-10A, 117A-18A, 124A-27A, 162A-66A, 176A, 182A, 212A).

In this regard, the conduct of Podell and the other individuals involved in these illegal payments was such as to preclude the United States from uncovering this information at an earlier date: Martin Miller came forward only in June, 1973, and, despite the Wall Street Law Journal article in August, 1971, Podell continuously maintained—right through his own direct testimony at the 1974 criminal trial—that a “second” Podell & Podell firm, of which he was not a member, had received the two checks in question, that the checks were for legal services unrelated to any activities by him before governmental agencies, and that he acted solely as a Congressman helping a constituent when he wrote letters and otherwise intervened on FAAL’s behalf before the FAA and CAB (225A-75A).

Statute Involved

Title 18, United States Code, Section 203:

“Whoever . . . directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

(1) at a time when he is a Member of Congress . . .

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, courtmartial, officer, or any civil, military, or naval commission

. . .

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

ARGUMENT

POINT I

The Admission and Estoppel Effect of Podell's Guilty Plea Establishes, As A Matter Of Law, His Liability To The United States For Forty Thousand Dollars (\$40,000)

Podell properly recognizes the well-settled principle of law that a criminal conviction constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters which the criminal judgment determined, whether the conviction resulted from a verdict after trial, *Emich Motors v. General Motors*, 340 U.S. 558, 568-69 (1951); *United States v. Fabric Garment Co.*, 366 F.2d 530, 534 (2d Cir. 1966), or from a plea of guilty, *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Kercheval v. United States*, 274 U.S. 220, 223 (1927). However, Podell attempts to restrict its application here by arguing that when applied to a conspiracy guilty plea, this principle is limited in its estoppel effect to the existence of the conspiracy and the fact of his participation (Br. 8-12). This argument completely ignores the fact that Podell pleaded guilty to a substantive conflict of interest count, as well as to the conspiracy count, and that his conspiracy-count plea was not a general guilty plea to a conspiracy but, rather, was carefully delineated and specific.

By pleading guilty to Count Five of the indictment (as modified at the guilty plea allocution) Podell admitted, and is estopped from disputing, that he received com-

pensation for services rendered and to be rendered by him in relation to proceedings before the CAB and FAA concerning matters in which the United States had a direct interest (46A-47A). Podell's compensation for those services is specifically identified in paragraph 5(c) of Count One which states that the compensation paid was "in the form of payments to the Citizen's Committee for the Re-election of Bertram L. Podell and in the form of fees to the law firm of Podell & Podell" (41A).*

Thus, there is no room for speculation here concerning the fact of illegal compensation, and how it was paid. The collateral estoppel effect of a guilty plea to a conspiracy count is limited to the essence of the conspiracy itself only when it cannot be determined therefrom which of the overt acts were committed, or which means were used to carry out the unlawful purpose of the conspiracy. *United States v. Guzzone*, 273 F.2d 121, 123 (2d Cir. 1959); *United States v. Ben Grunstein & Sons Co.*, 127 F. Supp. 907, 911 (D.N.J. 1955); *United States v. American Packing Co.*, 113 F. Supp. 223, 225 (D.N.J. 1953). However, unlike the courts in these decisions and in other authority cited by Podell, the District Court was

* Podell's claim (Br. 9) that the deletions in the indictment relate only to other counts, such as bribery and influence peddling, is belied by the nature of the changes themselves. The removal of "Department of State" and "Herbert Podell" wherever those words appeared, and the deletion of "directly and" from Count One, ¶ 5(c) can not fairly be characterized as a means merely to purge the taint of bribery from the guilty plea. Likewise, in the guilty plea there is a wholesale omission of material from Count One, such as the overt acts allegations, which could have been tailored more specifically to remove references to bribery if that were the sole import of the changes made (App. 59A). Clearly, the revised counts go well beyond eliminating bribery and influence peddling charges from the indictment; the material left unchanged in those counts can only be construed as specific admissions by Podell of his conflict of interest activities and compensation.

not confronted with an isolated conspiracy count, or with an undifferentiated conspiracy count. Here, the guilty plea was specific and clearly delineated.

Podell's attempted reliance on his guilty plea allocution to limit the legal effect of his guilty plea is also refuted by the record. Podell in his own words and through his attorney expressly acknowledged his plea to the revised Counts One and Five of the indictment:

"The Court: . . .

Mr. LaRossa, your counsel, has indicated that you are pleading guilty to certain counts of the indictment with certain deletions. I want to know whether that is, in fact, true, whether you are in fact doing that.

Defendant Podell: Yes, I am."

* * * * *

"Mr. LaRossa: I think Mr. Giuliani's statement should be read in conjunction with your acceptance of the plea, your Honor. It defines the limits.

Mr. Giuliani: Your Honor, the government is agreeable to taking the plea to count 1 the conspiracy count, and count 5, the conflict of interest count.

It is the government's view that a plea to count 1 encompassing paragraphs 1 and 5B and C, and to count 5 satisfies the interests of justice in this case." (60A, 62A).*

* Defendant's effort to limit the effect of his plea to the indictment by reference to one part of his allocution is misplaced. Nothing in Podell's allocution in any way contradicts the specific paragraphs of the indictment to which he pleaded guilty. The "tell me what you did" portion of the allocution is

[Footnote continued on following page]

The three checks submitted to the District Court, endorsed and cashed, were part of the record in the criminal case, and were the only such checks introduced into evidence in the criminal case by the Government. They are the fees and payments described in paragraph 5(c) of Count One of the indictment, as supplemented by Podell's further description during his guilty plea allocution.*

Unlike most guilty plea cases, where the scope of the estoppel effect of a guilty plea must be determined in an evidentiary vacuum, Podell's guilty plea was entered after the Government's entire case had been presented at trial and while Podell was being cross-examined. The elements of the charges in the indictment were amply established in the trial record. *United States v. Podell*, *supra*, 519 F.2d at 146, 149. Under these circumstances, consistent with the practice for resolving what was actually determined by a verdict or judgment of guilty (see *Emich Motors v. General Motors*, *supra*, 340 U.S. at 569), the District Court correctly concluded that these checks, absent contrary evidence, were the fees and payments referred to in Count One, paragraph 5(c) of the Indictment (285A-86A).

The Podell affidavit does not even attempt to create any issue of fact with respect to the \$29,000 campaign contribution from Martin Miller. The affidavit does state that \$1,350.00 of the \$2,350.00 check payable to Podell & Podell was for services performed by Podell's father; on

designed simply to assure the Court that the defendant did, in fact, commit a crime, and that purpose was fully served by the statement made by Podell. *United States v. Podell*, 519 F.2d 144, 150 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975). The full extent and specifics of the crime are set forth in those carefully selected portions of the indictment to which he admitted his guilt.

* Podell stated that the LCI paid the fee to his law firm for Podell's appearances before the FAA and CAB (62A).

that basis, the court below declined to include that amount in its summary judgment award (285A, 290A). Although Podell asserted that the remaining \$11,000 was unrelated to his conflict of interest activities, he nonetheless conceded that this \$11,000 paid Podell & Podell by LCI was for his services (220A-23A). Moreover, the interrelated Counts One and Five to which Podell pleaded guilty make it clear as a matter of law that these payments were for Podell's conflict of interest activities (38A, 40A-41A, 46A-47A).*

Where, as in the *Podell* criminal case, the criminal conviction results from a plea of guilty, rather than a verdict of guilty after trial, there is even greater warrant for the application of estoppel "since the defendant has

* It should further be noted in this regard that there is pending in the Bankruptcy Court in the Eastern District of New York a counterclaim against Podell & Podell brought by the trustee-in-bankruptcy for LCI seeking payment to the trustee of an amount equivalent to the money received by Podell & Podell due to Podell's conflict of interest activities. *In re Leasing Consultants, Inc.*, Bankruptcy No. 70-B-656. After a three day trial, in which Podell & Podell had every opportunity to contest whether the \$12,350 was received by Podell & Podell for reasons other than Bertram Podell's illegal activities, the Bankruptcy Judge ruled that this entire amount was paid for Podell's conflict of interest activities. These findings of fact and conclusions of law were affirmed on appeal by the District Court in the Eastern District of New York, although the Trustee in bankruptcy voluntarily withdrew his claim for any amount in excess of \$11,000. The District Court, however, remanded the claim for reconsideration, to determine whether Judge Duffy's decision in this case had created equitable considerations which warranted an adjustment in the Bankruptcy Court's award to the trustee for LCI. Upon reconsideration, the Bankruptcy Judge adhered to his original order; this order upon reconsideration is now on appeal to the District Court for the Eastern District of New York. See Exhibits B, C, and D to Appellant's Motion for Adjournment of Proceedings, dated December 8, 1977, filed with this Court.

admitted the truth of the charges contained in the indictment." *United States v. Schneider*, 139 F. Supp. 826, 829 (S.D.N.Y. 1956). Podell's admissions and the collateral estoppel effect of the criminal guilty plea eliminate any dispute as to the facts needed to establish Podell's liability on summary judgment. *Sell v. United States*, 336 F.2d 467, 473, 475 (10th Cir. 1964); *United States v. Eagle Beef Cloth Co.*, 235 F. Supp. 491, 492 (E.D.N.Y. 1964). Moreover, the \$40,000 from the three checks in evidence which Podell received for his conflict of interest activities eliminate any dispute as to the amount of his liability.

POINT II

The United States Is Entitled To The \$40,000 Paid For Podell's Activities in Violation of the Conflict of Interest Statute

Persons who hold public office stand in a fiduciary relationship to the people by whom they have been elected or appointed to serve. *Trist v. Child*, 88 U.S. (21 Wall.) 441, 450 (1874); *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 221 (N.J. 1952). An elected public official, such as Podell, holds a position of the highest public trust. *County of Cook v. Barrett*, 344 N.E. 2d 540, 545 (Ill. App. 1975), *appeal denied*, 63 Ill. 2d 555 (1976).

While as far as we know this is the first case which has involved a United States Congressman, it has been repeatedly held in a variety of situations involving public officials holding less exalted positions that funds received by a public official in violation of law are held in constructive trust for the Government he serves; that once a Government employee puts himself in the position of serving conflicting interests, the Government may recover "any undisclosed profits, commissions, gratuities or other emoluments received". *United States v. Drisko*, 303 F. Supp. 858, 860 (E.D. Va. 1969).

In *United States v. Carter*, 217 U.S. 286 (1910), the Supreme Court imposed a constructive trust on money received by a captain in the United States Army from contractors who had been awarded contracts by the Army Corps of Engineers under bidding conducted by him. The Court compelled the defendant to turn this money over to the Government despite proof that the work done by the contractors was an engineering success accomplished within the limit of the Congressional appropriation, and that the Government could not show any actual loss to it by reason of the defendant's conduct. In language squarely applicable to this case, the Court held that:

"... It is immaterial . . . whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party to say, 'You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct.' . . . It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. *The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent.* If he takes any gift, gratuity or benefit in violation of his duty . . . it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received." (Emphasis added) *Id.* at 305-06.

A similar result was reached in two recent Illinois cases. In *Fuchs v. Bidwill*, 334 N.E. 2d 117 (Ill. App. 1975), *rev'd on other grounds*, 359 N.E. 2d 158 (Ill. 1976), the court upheld a complaint seeking to impose a constructive trust upon profits made by members of the Illinois state legislature from the purchase and subsequent resale of shares of a corporation engaged in harness racing. The complaint alleged that the shares had been offered to the legislators, and subsequently repurchased from them at a profit, by the owner of the corporation upon the expectation and understanding that the legislators would exercise their power and influence on legislation concerning harness racing.

The defendants moved to dismiss the complaint on the ground that it failed to allege that any of the defendants did anything contrary to the public interest or committed any wrongful act. The court rejected this contention on the fundamental principle that "the rule of defining the responsibilities of public officials is not based upon harm necessarily done but upon equitable principles of preventing a conflict of opposing interests in the minds of officials". *Id.* at 121.

In *County of Cook v. Barrett*, *supra*, 344 N.E. 2d 540, the court upheld a complaint seeking to impose a constructive trust upon a former Clerk of Cook County who was alleged to have received payments from companies who were selling voting machines to Cook County, and from insurance companies to which he had awarded insurance contracts on the machines. The defendant moved to dismiss the complaint on the ground that no damage to the County had been alleged. Relying on *Carter* and *Fuchs*, *supra*, the court upheld the complaint with the following pertinent language:

"... The absence of an allegation of damage is immaterial. A constructive trust is not an action for 'recovery' or compensation under any theory

of contract or tort. It is a strict equitable doctrine applied to cure a fiduciary's breach of his duty of loyalty by erasing the source of his conflict of interest, and transferring it to the innocent beneficiary. Bad faith is not an essential element of disloyalty (*Slay v. Burnett Trust, supra*) and good faith is no defense to the charge." *Id.* at 548.

The foregoing cases, and others similar to them,* make it abundantly clear that a public official who receives money under circumstances where the receipt of the money represents a conflict of interest with the Government he represents holds the money, as a matter of law, in constructive trust for his Government. None of these decisions, contrary to Podell's assertions (Br. 13), relied upon a statute, and none required that the elements of a bribe be proven. Indeed, 18 U.S.C. § 218, cited in Podell's brief as the barometer of Congress' general legislative intent, specifically states that it is "in addition to any other remedies provided by law." *United States v. Drumm, supra*, and *United States v. Drisko, supra*, two constructive trust actions successfully brought by the United States against employees after 18 U.S.C. § 218 was enacted, demonstrate that the existence of the remedies provided for in 18 U.S.C. § 218 does not prevent the type of constructive trust relief presently before this Court.** Moreover, such relief promotes Congress' intent

* See, e.g., *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964); *Jersey City v. Hague*, 115 A.2d 8 (N.J. 1955); and *City of Boston v. Santosuosso*, 10 N.E. 2d 271 (Mass. 1937).

** *United States v. Guzzone, supra*, 223 F.2d 121 and *United States v. Kates*, 419 F. Supp. 846 (E.D. Pa. 1976), relied upon by Podell (Br. 13), are completely inapposite. The former is an action under the Surplus Property Act (46 U.S.C. § 489) and the latter is a case under the False Claims Act (31 U.S.C. § 231). Neither decision contains any discussion limiting or affecting any non-statutory actions or remedies available to the United States.

in enacting 18 U.S.C. § 203 and its predecessor statute (18 U.S.C. § 281), namely

“ . . . to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward.” . . . *The evils are further increased if the Member of Congress fails to disclose the fact that he is appearing as an attorney for compensation and not as a disinterested public official.* (Emphasis added.) (Citations omitted.) *United States v. Johnson*, 215 F. Supp. 300, 315 (D. Md. 1963), *aff'd in relevant part*, 337 F.2d 180 (4th Cir. 1965), *aff'd on other grounds*, 383 U.S. 169 (1966).

See Rule XLIII, House Code of Official Conduct, *Manual and Rules of the House of Representatives* (adopted April 3, 1968); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 548-50 (1961).

In the present case, Podell has admitted, by a plea of guilty to criminal charges, that he received money from a corporation (LCI) and from an individual acting on its behalf for his services as a Congressman to influence governmental action affecting LCI, in violation of the conflict of interest statute (18 U.S.C. § 203). “A violation of this section unquestionably demonstrates a breach of trust, for in order to fall within its prohibition, a member of Congress must shed the duty of disinterested advocacy owed the government and his constituents in favor of championing private interests potentially inconsistent with this charge.” (opinion, 281A; 436 F. Supp. at 1042).

POINT III**A New York State Statute of Limitations Governing Claims Based On Fraud Does Not Apply To This Common Law Equitable Action To Impose A Constructive Trust Brought By The United States**

Podell, presuming success on his argument that the Government's constructive trust action fails to state a claim upon which relief may be granted, makes the argument that an amended complaint or newly commenced action based on fraud would be barred by New York C.P.L.R. §§ 203(f), 213 (Br. 14). Podell's argument on appeal is thus not directed at the constructive trust and unjust enrichment claims presently before this Court—which claims, as the District Court noted, are not based on fraud (opinion, 279A; 436 F. Supp. at 1042). Indeed, Podell has implicitly conceded that in this action the United States is not subject to any statute of limitations.

As set forth fully above, the right of the Government to seek imposition of a constructive trust on the proceeds from Podell's breach of his fiduciary duties cannot be doubted. Likewise, the case law also makes it clear that the United States is not subject to any statute of limitations or to the defense of laches in enforcing its rights, such as those asserted here, unless Congress has specifically provided otherwise, or the cause of action sued upon is specifically created by state statute and did not exist at common law. *United States v. Summerlin*, 310 U.S. 414, 446 (1929); *United States v. 93 Court Corporation*, 350 F.2d 386, 388-89 (2d Cir. 1965), *cert. denied*, 382 U.S. 984 (1966); *United States v. Franklin National Bank*, 376 F. Supp. 378, 384 (E.D. N.Y. 1973). The Government's constructive trust action against Podell is founded on basic common law principles; moreover, it is not a right of action created by state law, nor has Congress enacted a specific statute of limitations

relevant to it.* Therefore, no statute of limitations, either state or federal, is applicable here.

* Jr. Court below the Government, anticipating that Podell would seek to invoke 28 U.S.C. § 2415 (the statute of limitations governing certain actions brought by the United States), argued that equitable actions by the United States to impose a constructive trust are not limited by 28 U.S.C. § 2415 or by any other statute of limitations. Alternately, the Government contended that even if Section 2415's six year statute of limitations were applicable to such constructive trust actions, the provisions of 28 U.S.C. § 2416 make it clear that this action was timely filed. That section excludes from the computation of any limitation period established by Section 2415 "all periods during which —

(c) facts material to the right of an action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances."

In this case, Podell's illegal compensation by LCI and Martin Miller for LCI was not known until August 23, 1971, (the two checks to the law firm of Podell & Podell) and June 27, 1973 (the purported campaign contribution check). (See pages 11-13 *supra*). This action was commenced on January 30, 1976, well within the six year limitation period provided by §§ 2415-16.

The District Court expressly declined to reach either of the questions briefed by the Government because Podell did not contend that any statute of limitations applied to a constructive trust action. (opinion, 279A, 289A; 436 F. Supp. at 1042).

CONCLUSION

The judgment of the District Court should be affirmed.

Dated: New York, New York
December 21, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
21st day of December 19 77 she served ~~a~~ copy of the
within Brief for Appellee

by placing the same in a properly postpaid franked envelope
addressed:

Daniel M. Shientag
160 Broadway
New York, New York 10038

And deponent further says s he sealed the said envelope and placed the same in the mail chute box for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marion L. Bryant

21st day of December, 19 77

PAULINE P. TROIA
Notary Public, State of New York
No. 01-4682861
Qualified in New York County
Commission Expires March 30, 1978

